No. 81-2057

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In The

Supreme Court of the United States

October Term, 1982

ALAN J. KARCHER, Speaker, NEW JERSEY ASSEMBLY, *et al.*,

Appellants,

vs.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF FOR APPELLEES EDWIN B. FORSYTHE, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the District Court properly invalidated a congressional redistricting statute which created population deviations which were neither unavoidable nor justified.

2. Whether the District Court's unanimous finding of fact, in which it rejected as pretextual the Legislature's claim that the avoidable population deviations of New Jersey P.L. 1982, c. 1 were justified as the result of a policy of preserving minority voting strength, is clearly erroneous.

3. Whether, in light of the lack of any evidence to establish reliably the existence or magnitude of any undercount in the 1980 New Jersey census, the District Court properly declined to declare the avoidable and unjustified population deviations of P.L. 1982, c. 1 *de minimis* and therefore not violative of the Constitution.

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CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Article I, Section 2 of the United States Constitution is set forth in appellants' brief, and New Jersey P.L. 1982, c. 1 is set forth as an appendix to the District Court's opinion (J.S. 15a-20a).

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973b and 1973c, and the Appendix to 28 C.F.R. Part 51, are lengthy. They are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This appeal challenges the judgment of the three-judge United States District Court for the District of New Jersey, which invalidated a congressional redistricting statute enacted by New Jersey on the ground that it did not achieve, as nearly as practicable, the precise population equality mandated by Article I, §2 of the Constitution. *Daggett v. Kimmelman*, 535 F. Supp. 978 (D.N.J. 1982) (three-judge court) (J.S. 1a-14a).

The District Court, with one judge dissenting, found that the 0.6984% relative overall range of deviation[1] created by the New Jersey statute (P.L. 1982, c. 1) was neither unavoidable nor justified, within the meaning of *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). 535 F. Supp. at 981-983 (J.S. 6a-10a). The Court found the deviation not unavoidable because several other plans were available to the Legislature which would have created a lower relative overall range of deviation than the enacted law. 535 F. Supp. at 982 (J.S. 8a). The Court rejected as a factual matter appellants' secondary contention that the deviation was justified by the Legislature's purported goal of avoiding the dilution of minority voting strength. 535 F. Supp. at 982-983 (J.S. 9a-10a). Even the dissenting judge joined in the majority's view, as he expressed it, "that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual." 535 F. Supp. at 983 (J.S. 11a) (dissenting opinion of Gibbons, J.). The Court also refused to find that because of "the statistical imprecision of the census," the 0.6984% deviation was "the functional equivalent of mathematical equality." Since the censuses at issue in *Kirkpatrick* and *White v. Weiser*, 412 U.S. 783 (1973), also were imprecise, the District Court held that this Court's repudiation of similar *de minimis* arguments in those cases foreclosed appellants' census imprecision claim. 535 F. Supp. at 983 (J.S. 10a).

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1. "Relative overall range" of deviation, which is the statistic used most often in this Court's redistricting cases, is the difference between the population of the smallest district and the population of the largest district, divided by the average district population and expressed as a percent (App. 121). The District Court referred to this figure as "total deviation."

In summary, the District Court found in its March 3, 1982 opinion that the New Jersey Legislature had had the option to choose from several other available redistricting plans which would have created a lower total population deviation than the 0.6984% of P.L. 1982, c. 1. 535 F. Supp. at 982 (J.S. 8a). Because the Legislature was concerned with criteria other than the constitutional mandate of population equality in considering competing redistricting plans, the Court found, it refused to choose a plan which achieved precise population equality as nearly as practicable. *Id.* at 981 (J.S. 6a). Though the legislative leaders also claimed to have sought to "protect minority interests" in drawing district lines, both the majority and dissenting opinions found as a fact that this claimed motivation was merely pretextual and bore no relation to the deviations created by P.L. 1982, c. 1. *Id.* at 982-983 (J.S. 9a-11a).

The District Court therefore held that P.L. 1982, c. 1 violated Article I, §2 and granted a permanent injunction against the conducting of primary or general congressional elections thereunder. A judgment embodying that disposition was filed on March 8, 1982, (J.S. App. B) and on the same day the District Court unanimously denied appellants' applications for a stay pending appeal. Appellants filed a notice of appeal in the District Court on March 8, 1982 (J.S. App. C).

On March 15, 1982, Justice Brennan stayed the judgment of the District Court pending final determination of the appeal (J.S. App. D). The full Court denied motions to vacate the stay or to expedite the schedule for appeal on March 29, 1982, (J.S. App. E) and Justice Brennan denied a further motion to modify the stay on April 13, 1982 (J.S. App. F).

This Court noted probable jurisdiction of the appeal on June 21, 1982.

SUMMARY OF ARGUMENT

The District Court properly invalidated New Jersey P.L. 1982, c. 1, the congressional redistricting plan enacted by the New Jersey Legislature and Governor, on the ground that the population deviations among the fourteen congressional districts created by

the statute violated the mandate of Article I, §2 that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

Applying the first branch of the two-part test of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), to the undisputed fact that other available redistricting plans resulted in greater population equality, the District Court correctly concluded that the population deviations created by the enacted statute were not unavoidable and the statute was not the result of a good-faith legislative effort to achieve absolute equality. Moving to the second portion of the *Kirkpatrick* test, the District Court did not err in rejecting on independently-sufficient factual and legal grounds appellants' sole purported "justification" for the avoidable population deviations of P.L. 1982, c. 1. The evidence compelled the Court's unanimous finding that the Legislature's claimed concern with avoiding dilution of minority voting strength did not explain the population deviations created by the statute, and was in fact a pretext invented after the fact in an attempt to sustain the law. The real reasons for the unnecessary population deviations of P.L. 1982, c. 1 were the partisan political considerations for which the legislative leadership sacrificed the constitutional mandate of population equality.

Moreover, even if the Legislature had been actuated by its claimed solicitude for minority voting rights, it would not have been entitled to consider race in congressional redistricting in New Jersey since no part of the State is subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c (1981). Satisfaction of the pre-clearance provisions of that statute is the only acceptable reason for race-conscious redistricting, which otherwise violates the Fourteenth and Fifteenth Amendment rights of non-minority voters.

Since all parties agree that there is no reliable way to determine whether or to what extent there is an undercount in the 1980 New Jersey census, the District Court properly rejected appellants' contention that the 0.6984% population deviation in P.L. 1982, c. 1 is *de minimis* and the functional equivalent of zero, and therefore does not violate the Constitution. The same argument

was before this Court in *Kirkpatrick* and in *White v. Weiser*, 412 U.S. 783 (1973), and there is no reasoned basis for this Court to accept now what it found insufficient then. The effect of such a *de minimis* rule, as the Court observed in *Kirkpatrick* and as the evidence demonstrated here, would be to encourage legislators to strive for something less than the equality required by the Constitution. In addition, the alleged undercount is assertedly the result of the census' failure to enumerate illegal aliens. Since there is no constitutional or statutory requirement that illegal aliens be included in the population base for intrastate congressional redistricting, and New Jersey did not purport to include them, any census imprecision caused by their exclusion is immaterial.

Finally, appellants' contention that the District Court gave insufficient deference to the prerogatives of the Legislature is meritless. The District Court had a duty to determine whether P.L. 1982, c. 1 violated the Constitution, and no state legislative policy can justify an unconstitutional statute. The District Court properly limited its initial judgment to the invalidation of the statute, and afforded the Legislature the opportunity to enact a constitutional substitute before any further judicial action would be taken. The evidence before the District Court established that the Legislature sacrificed the constitutional standard of population equality in favor of such non-constitutional, partisan concerns as preservation of pre-existing districts and the seniority of incumbent Democratic congressmen. When such political concerns result in a statute which violates the paramount constitutional command of population equality, they are entitled to no judicial deference and the unconstitutional law must be struck down. Only in any subsequent remedial stage of the litigation, which was not reached here, is a District Court required to promulgate a redistricting plan which leaves state reapportionment policies intact except to the extent necessary to cure the constitutional defect.

The New Jersey Legislature failed to comply with the federal constitutional command of population equality, and instead enacted a statute which responded to the partisan, political concerns of its legislative majority instead of its constitutional obligation to the electorate. The District Court therefore was obligated to invalidate P.L. 1982, c. 1 and its judgment should be affirmed.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY APPLIED *WESBERRY* v. *SANDERS*, *KIRKPATRICK* v. *PREISLER* AND *WHITE* v. *WEISER* IN INVALIDATING P.L. 1982, c. 1, SINCE OTHER PLANS WERE AVAILABLE TO THE LEGISLATURE WHICH MORE NEARLY ACHIEVED PRECISE MATHEMATICAL EQUALITY AND THERE WAS NO JUSTIFICATION FOR THEIR REJECTION.

P.L. 1982, c. 1, like any congressional redistricting statute adopted by a state legislature, must be measured against the requirement of Article I, §2 of the Constitution that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States . . . ." In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), this Court declared that the constitutional command "means that as nearly is as practicable one man's vote in a congressional election is to be worth as much as another's." Justice Black expressed the Court's condemnation of "vote-diluting discrimination," 376 U.S. at 8, as contrary to the "Great Compromise" by which the Constitutional Convention established the two Houses of Congress. 376 U.S. at 8-9; *see* 376 U.S. at 9-18.

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court "elucidate[d] the command of *Wesberry* that congressional districting meet the standard of equal representation for equal numbers of people as nearly as is practicable." *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969). The Court announced a two-part test in *Kirkpatrick*:

> 1. "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality."
>
> 2. "Unless population variances among congressional districts are shown to have resulted despite such an effort, the State must justify each variance, no matter how small."

394 U.S. at 530-531. Justice Brennan summarized the rule: "Therefore, the command of Art. I, §2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 531.

A. The District Court was correct that the population deviations of P.L. 1982, c. 1 were not unavoidable and that the statute was not the result of a good-faith effort to achieve absolute equality.

This Court reaffirmed and reemphasized the strictness of the *Kirkpatrick* requirement of "unavoidab[ility] despite good-faith effort to achieve absolute equality" in *White v. Weiser*, 412 U.S. 783 (1973). Addressing the first part of the *Kirkpatrick* test, the Court applied *Kirkpatrick's* substantive constitutional analysis to hold that the percentage deviations in the plan enacted by the Texas Legislature, though "smaller than those invalidated in *Kirkpatrick* and *Wells*, . . . were not 'unavoidable,' and the districts were not as mathematically equal as reasonably possible." 412 U.S. at 790. In a footnote with particular relevance to the instant case, Justice White observed that the "very existence" in the Legislature of congressional reapportionment bills with lower deviations than the enacted plan "indicates that it was possible and practicable to construct a redistricting scheme with lower population deviations among districts than those embodied in [the enacted bill]." 412 U.S. at 790, n. 9.

In the present case, similarly, there were at least four redistricting plans available to the New Jersey Legislature at the time P.L. 1982, c. 1 was signed into law which would have created smaller population deviations than it does.[2] The very existence of these plans, though by no means the exclusive proof of the Legislature's lack of good faith, demonstrates as in *Weiser* "that it was possible and practicable" to formulate a redistricting plan which achieved the constitutional goal of absolute population equality more nearly than P.L. 1982, c. 1. *See, e.g., Doulin v.*

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2. *See* list at 26, *infra*.

White, 528 F. Supp. 1323, 1331 (E.D. Ark. 1982) (three-judge court). The very existence of more equipopulous plans, together with the Legislature's failure to enact one of them, conclusively negates the proposition that the Legislature made a good-faith effort to achieve precise population equality and therefore that the population deviation of the enacted law was unavoidable despite such an effort.

The District Court faithfully applied the *Kirkpatrick* test to P.L. 1982, c. 1, and found that the statute failed to clear the first hurdle:

> It is clear that the .6984% population deviation of P.L. 1982, c. 1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%.

535 F. Supp. at 982 (J.S. 8a). This analysis is founded squarely upon this Court's reasoning in *Kirkpatrick*, 394 U.S. at 530, and in *Weiser*, 412 U.S. at 790, n. 9. Unless those cases are to be overruled, the District Court's conclusion must be affirmed.

B. The District Court properly rejected appellants' resurrection of the "*de minimis*" theory, repeatedly discredited by this Court, in the guise of "census imprecision."

Despite the uncontradicted evidence, appellants contest the District Court's conclusion that the Legislature failed to make a good-faith effort to achieve absolute equality, and that the deviations created by P.L. 1982, c. 1 therefore were not unavoidable. They assert that the 0.6984% deviation is smaller than the "statistical imprecision of the census data," though there is nothing in the record to establish what that claimed "imprecision" is, and urge this Court to declare that "[a] reapportionment plan that contains deviation less than the statistical imprecision of the census data" is small enough to satisfy without question the "as nearly as practicable" standard [Brief for Appellants, Point II(B), at 19-22].

Missouri's similar *de minimis* argument was firmly rejected by this Court in *Kirkpatrick*, and that reasoning is equally dispositive of appellants' reassertion of the *de minimis* claim in the clothing of "census imprecision":

> The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, *supra*, at 18, the "as nearly as practicable" standard requires that the State make a good faith effort to achieve precise mathematical equality. [Citation omitted.] Unless population variances among congressional districts are shown to have resulted despite such effort, the States must justify each variance, no matter how small.

394 U.S. at 530-531.[3] Fixed, *per se* standards are particularly ill-suited to the problem of census imprecision, since appellants concede that the degree of imprecision "is not distributed equally among States, or within different areas inside any State." (Brief for Appellants at 17).

In *Weiser*, a State once again sought to convince the Court "that *Kirkpatrick* and *Wells* should be modified so as not to

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3. In reaching its conclusion, the Court declined to adopt the suggestion in Justice Fortas' concurring opinion that "[n]o purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based." 394 U.S. at 539 and n. 3.

The same proposition, which appellants resurrect here, (Brief for Appellants, Point II), was argued extensively by Texas in support of its contention in *White v. Weiser* that the *Kirkpatrick* standard "ought to be reconsidered and revised." [Brief on the Merits at 26 (*filed sub nom. Bullock v. Weiser*)].

require the 'small' population variances among congressional districts involved in this case to be justified by the State." 412 U.S. at 792. The Court nevertheless reaffirmed the validity of *Kirkpatrick's* rejection of a *de minimis* rule. Justice White observed for the Court that, compared with state legislative districts, "congressional districts . . . are relatively enormous, with each percentage point of variation representing almost 5,000 people." 412 U.S. at 793.[4] The Court thereby rejected the proposition, for which Texas had specifically and extensively argued, that the inherent imprecision of the census data renders such calculations meaningless. In so doing, it repudiated the assertion of appellants and the District Court dissent in the present case that there is a level of deviation so small as to "demonstrat[e] *as a matter of law* a good faith effort to achieve equal member districts," without reference to the uncontested fact that plans with smaller population deviations were available to the Legislature. 535 F. Supp. at 985 (J.S. 14a) (dissenting opinion of Gibbons, J.) (emphasis added).

The District Court majority properly recognized that *Kirkpatrick* and *Weiser*, when viewed in light of the census imprecision arguments advanced in Justice Fortas' *Kirkpatrick* concurrence and Texas' *Weiser* brief, foreclosed appellants' contention:

> Whatever margin of error was present in the 1980 decennial census, there were similar limitations in the 1960 and 1970 decennial censuses when *Kirkpatrick* and *White* were decided. Despite this factor, the Court could not have spoken more clearly. "We reject. . . [the] argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as

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4. In comparison to the "almost 5,000 people" in *Weiser*, each percentage point of variation in the present case represents 5,261 people. The 0.6984% maximum deviation of P.L. 1982, c. 1 thus represents 3,674 people, in a State where the last gubernatorial election was decided by 1,797 votes. *Fitzgerald's Legislative Manual, State of New Jersey* 458 (1982).

> practicable' standard." *Kirkpatrick*, 394 U.S. at 530."

535 F. Supp. at 983 (J.S. 10a).

C. The District Court properly rejected appellants' purported "justification" for the Legislature's failure to achieve absolute population equality as nearly as practicable.

Appellants claim, without citing any authority for the proposition, that "[t]he importance of preventing dilution of minority voting strength is great, and justifies small deviations from population equality" as a matter of law. (Brief for Appellants at 34). Relying solely on the self-serving testimony of Democratic legislative leaders, appellants further assert that "[t]he record establishes that avoiding the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c. 1." (Brief for Appellants at 34 and n. 37). On this flawed legal and factual foundation they construct the equally-defective premise that the New Jersey Legislature was within some unidentified "constitutional prerogative" in "selecting the plan which best protects minorities over alternatives with slightly lower census population deviations." (Brief for Appellants at 35). This argument is wrong on the facts and wrong on the law.

1. The District Court properly found, as a matter of fact, that the Legislature's claimed solicitude for avoiding dilution of minority voting strength — the sole claimed "justification" for the adoption of P.L. 1982, c. 1 instead of a less-deviant bill — was "pretextual."

The District Court rejected appellants' "minority dilution" excuse as a matter of fact. 535 F. Supp. at 982-983 (J.S. 9a-10a). Indeed, even the dissenting judge agreed "that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual." 535 F. Supp. at 983 (J.S. 11a). This unanimous finding of fact must be upheld by this Court unless clearly erroneous, *City of Rome v. United States*, 446 U.S. 156, 183 (1980), and the affidavits and deposition testimony which constitute the record before the District Court fully justify that Court's rejection of the legislative leadership's

carefully-orchestrated, *post hoc* solicitude for minority voting rights.[5] The District Court's finding as trier of fact that the New

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5. When asked by the District Court at oral argument whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority strength, counsel for appellants was forced to concede that he could not "say that happened with certainty. There were many conversations and judgments which went into the passage of the present law." (App. 181; *cf.* App. 178-182). Indeed, Assembly Speaker *Pro Tem* Christopher Jackman could not even recall whether P.L. 1982, c. 1 had been defended in debate on the ground that it avoided dilution of minority power [Jackman Deposition at 86-87 (J. Ex. 21; this portion of deposition is not reproduced in the Joint Appendix, and is therefore attached hereto in Appendix B)].

Appellants' cynical manipulation of their pretextual "minority non-dilution" rationale is typified by the self-contradictory affidavit of S. Howard Woodson, Jr., submitted to the Court as Defendants' Exhibit 4 (App. 93-96). Mr. Woodson's affidavit identifies him as a former Democratic Assemblyman and New Jersey's first black Assembly Speaker (App. 93). In Paragraph 4 of his affidavit Mr. Woodson criticizes Bill A-3817, which would have created a total population deviation of only 0.4515% as compared to the enacted bill's 0.6984%, and which would have increased the black majority in the Tenth District to 56.70% over the enacted bill's 54.75%. (*See* App. 119-142.) He conspicuously fails to point out that A-3817 would have placed the 57% black City of Orange in the 56.70%-black Tenth District, while P.L. 1982, c. 1 relegates Orange to the 93%-white Eleventh District. 535 F. Supp. at 982-983 (J.S. 9a-10a). Woodson nevertheless contends that A-3817 was inferior to P.L. 1982, c. 1 because A-3817 would have divided areas of significant black population in Trenton and in Burlington County into two separate districts: "By combining municipalities with significant black population in one district, P.L. 1982, c. 1 significantly enhances the congressional influence of blacks in both counties." (App. 94).

Later in his affidavit, however, Mr. Woodson is called upon to explain why Bill A-3772, which would have combined the significant black populations of Trenton and Camden in one congressional district, was also detrimental to the interests of black voting strength. Apparently heedless of his own claim only seven paragraphs earlier that "combining municipalities with significant black population in one district . . . significantly enhances the congressional influence of blacks in both counties," Mr. Woodson now asserts:

> As a black political activist with what I believe to be many years of experience in minority representation, I am unalterably opposed to the inclusion of the cities of Camden and Trenton in the same congressional district. To do so would severely impact as a detriment to minority representation in central and southern New Jersey. . . . [The black population

(Cont'd)

Jersey Legislature was not actuated by a concern for minority voting strength is unassailable, and should not be disturbed by this Court. Since this is the sole justification upon which appellants rely, (App. 182) this Court must affirm the District Court's finding that the Legislature's failure to achieve precise mathematical equality as nearly as practicable was unjustified.

2. Even if the Legislature had been motivated by non-dilution of minority voting strength, a state legislature may not permissibly consider race in redistricting where no part of the State is subject to the pre-clearance provisions of §5 of the Voting Rights Act.

This Court established in *Kirkpatrick* that a State could not justify population variances in congressional districts on the ground that they "were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress." 394 U.S. at 533. Justice Brennan continued for the Court:

> . . . [T]o accept population variances, large or small, in order to create districts with specific

(Cont'd)

> percentages of Trenton and Camden] taken individually constitute two strong minority voices and allow for these two groups of minorities to rest their concerns on two Congressmen rather than one Congressman as provided for by A-3772. Although A-3772 joins Camden and Trenton resulting in a larger concentration of minorities (24.2% of the population) in a single district, it nevertheless, on balance works to deminish [sic] minority impact on congressional representatives on a statewide basis. (App. 94-96).

The only consistent thread in Mr. Woodson's analysis of minority strength under P.L. 1982, c. 1, as compared to A-3817 or A-3772, is that P.L. 1982, c. 1 always wins. (It should be noted that neither appellees nor the District Court relied on A-3772 as a basis for invalidating P.L. 1982, c. 1, because it was flawed in other respects.) The facile manipulation of facts and political theory in the Woodson affidavit, taken together with the other evidence of the insincerity of the minority anti-dilution claim which is discussed in the District Court's opinion, 535 F. Supp. at 982-983 (J.S. 9a-10a), demonstrates the accuracy of the District Court's unanimous perception that this rationale was only a pretext invented after the fact in an attempt to justify the Legislature's politically-motivated refusal to follow the constitutional command of precise mathematical equality as nearly as practicable.

> interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds v. Sims*, [377 U.S. 533] at 579-580. See also *Davis v. Mann* 377 U.S. 678, 692 (1964).

Id.

Appellants assert, however, that "[p]reservation of minority voting strength" is now "a constitutionally permissable [sic] objective in reapportionment," relying solely on *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (Brief for Appellants at 34).[6]

United Jewish Organizations has absolutely no applicability to this case, and except in the narrow circumstances covered there this Court has never retreated from *Kirkpatrick's* prohibition of legislative reliance on non-fragmentation of economic or social interest groups as purported justification for unnecessary population variances in congressional districts.

Part I of Justice White's opinion, the only portion in which a majority of the Court joined, notes that the Court of Appeals had "observed that the case did not present the question whether a legislature, 'starting afresh,' could draw lines on a racial basis so as to bolster nonwhite voting strength, but rather the 'narrower' question whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under

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6. Appellants erroneously characterize Justices Stewart and Powell as "concurring" with the *United Jewish Organizations* plurality opinion cited in support of this assertion. In fact Justices Stewart and Powell concurred only in the judgment of the Court. That judgment was announced by Justice White, who filed the opinion cited by appellants, but only Justices White, Stevens, Brennan and Blackmun joined or concurred in the portion of that opinion which appellants cite for this proposition.

the Voting Rights Act, 510 F. 2d at 524." 430 U.S. at 154. In Part III of the plurality opinion, representing the views of four Justices, Justice White expressly declined to reach the issue for which appellants claim *United Jewish Organizations* stands:

> New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that basis by the Court of Appeals. Because the Court of Appeals was essentially correct its judgment may be affirmed without addressing the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a non-white majority roughly approximates the percentage of nonwhites in the county.

430 U.S. at 165. Only in Part IV of the plurality opinion, in which only two other Justices joined, was it viewed permissible absent the applicability of §5 of the Voting Rights Act for a State consciously to create districts in which a particular racial group will be in the majority. 430 U.S. at 168.

The Court's judgment in *United Jewish Organizations*, therefore, established only that "the Constitution does not prevent a State *subject to the Voting Rights Act* from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with §5" of the Act. 430 U.S. at 161 (emphasis added) (plurality opinion of White, J.). This proposition garnered the support of a majority of the Court only through the votes of Justices Stewart and Powell, who concurred in the judgment in specific reliance on the applicability of the Voting Rights Act to New York's action: "The clear purpose with which the New York Legislature acted — in response to the position of the United States Department of Justice under the Voting Rights Act — forecloses any finding that it acted with the invidious purpose of discriminating against white voters

[in violation of the Fourteenth or Fifteenth Amendments]." 430 U.S. at 180 (opinion of Stewart, J., concurring in the judgment). (Footnote omitted.)

Unlike New York, however, no part of New Jersey is subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c (1981). The provisions of that section apply only to states or political subdivisions as to which the Attorney General has found the existence of a prohibited "test or device" as a prerequisite for voting or registration, and as to which the Director of the Census has found that less than 50 percent of its voting-age residents were registered to vote or voted in the last Presidential election. 42 U.S.C. §§1973b(a), 1973b(b), 1973c (1981). No such finding has been made with respect to New Jersey, or to any political subdivision of New Jersey, and §§1973b and 1973c are therefore wholly inapplicable to this case. "Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended," Appendix to *Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended,* 28 C.F.R. Part 51 (1981).

Appellants' contention that *United Jewish Organizations* establishes that New Jersey was entitled to consider race in formulating its congressional reapportionment plan because "the practical necessity of complying with Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, requires that race be taken into account," therefore, is simply false. (Brief for Appellants at 34, n. 36). Moreover, even if *United Jewish Organizations* did apply to New Jersey, neither it nor any other of this Court's decisions cited by appellants stands for the proposition that "[t]he importance of preventing dilution of minority voting strength . . . justifies small deviations from population equality" in congressional districts. (Brief for Appellants at 34).

First, *United Jewish Organizations* dealt only with state legislative redistricting and did not involve the strict population equality requirements imposed upon congressional reapportionment by Article I, §2, which are far more stringent then the equal protection test applicable to state legislative districting. *Mahan v. Howell,* 410 U.S. 315, 324 (1973). Second,

even the portion of the *United Jewish Organizations* plurality opinion which would have authorized race-conscious districting without reference to the applicability or requirements of the Voting Rights Act states clearly that population equality cannot be sacrificed:

> . . . [W]e think it also permissible for a State, *employing sound districting principles such as* compactness and *population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

430 U.S. at 168 (plurality opinion of White, J.) (emphasis added).[7] This portion of the plurality opinion then crystallizes its recognition of the importance of population equality by quoting *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), for the proposition that population equality is a prerequisite to the legitimacy of race-conscious districting in state legislatures. 430 U.S. at 168.

Far from providing any support for appellants' contention that the prevention of dilution of minority voting strength justifies deviations from population equality, therefore, *United Jewish Organizations* stands for a quite different proposition: that even if race-conscious redistricting were permissible in a jurisdiction not covered by the Voting Rights Act, the Legislature would nonetheless be bound to respect the applicable standard of population equality before it could permissibly favor one group of voters over another through racially-preferential redistricting.

In summary, appellants' contention that the constitutional mandate of precise mathematical equality among congressional districts, as nearly as practicable, is to be balanced against or

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7. The districts created by P.L. 1982, c. 1 are hardly compact. *See* map in Motion to Affirm at 8a.

sacrificed in order to achieve political power for a particular economic or social interest group is precisely the purported justification which this Court specifically rejected in *Kirkpatrick*.[8] *United Jewish Organizations* did nothing to change that rule in jurisdictions such as New Jersey which are not subject to §5 of the Voting Rights Act. Moreover, even those Justices who would have permitted race-conscious reapportionment of state legislative districts without regard to the applicability of the Voting Rights Act specifically conditioned its permissibility upon compliance with applicable standards of population equality.[9] Since P.L. 1982, c. 1 fails to comply with those standards, appellants' purported justification based on non-dilution of minority voting strength must fail.

II.

THE DISTRICT COURT WAS UNDER NO OBLIGATION TO DEFER TO STATE "LEGISLATIVE POLICY" IN DETERMINING WHETHER P.L. 1982, c. 1 VIOLATED THE FEDERAL CONSTITUTION.

Appellants claim that *White v. Weiser* stands for the proposition that a court must defer to "legislative policy" as a "primary factor" in assessing the constitutional sufficiency of a legislatively-enacted congressional redistricting statute such as P.L. 1982, c. 1. (Brief for Appellants, Point I). This assertion is fundamentally flawed by its confusion of the standards

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8. In addition to its insufficiency as a justification under Article I, §2, racially-motivated redistricting may violate the Fourteenth and Fifteenth Amendment rights of non-minority voters in the absence of the statutory compulsion of the Voting Rights Act. *United Jewish Organizations, supra.*

9. It should also be noted that the sole portion of New Jersey with a black population large enough to compose more than fifty percent of a congressional district is the City of Newark and surrounding communities. That district has elected appellant Peter W. Rodino, Jr. as its Congressman for the past 34 consecutive years, most recently on November 2, 1982. Appellants presumably do not contend that the consistent success of appellant Rodino's 18 consecutive campaigns has resulted from or in the dilution of black voting strength or political power in that area, thereby necessitating the extraordinary sacrifice of the paramount constitutional command of population equality.

applicable to *judicial review* of legislatively-enacted plans, which is the issue presented by this appeal, with the more circumscribed considerations appropriate to *judicial formulation* of remedial plans, which was the issue in *Weiser*.

A. No deference to state redistricting policy is required of a District Court in simply determining whether a legislatively-enacted congressional redistricting plan violates Article I, §2.

Justice White's opinion for the Court in *Weiser* is divided into two parts. Part I affirms the District Court's invalidation of Texas' legislatively-enacted congressional redistricting statute in a straightforward application of *Wesberry, Kirkpatrick* and *Wells*. 412 U.S. at 790-793. Part II, by contrast, is addressed solely to the proper scope of the District Court's remedial discretion in affirmatively promulgating a particular plan ("Plan C") instead of another available alternative ("Plan B"). Contrary to the suggestion of appellants' brief, at 11-13, it is solely with respect to Part II's analysis of the District Court's remedial authority that the issue of deference to state policies is discussed.

Appellants claim, in purported reliance on *White v. Weiser*, that "[a] legislature's choices of policies to be followed in redistricting are so tied to local preferences — and at the same time so important to citizens of the State — that this Court has already indicated that those policies are more important than miniscule differences in deviation from absolute census population equality." (Brief for Appellants at 12). Yet in Part I of the Court's opinion in *Weiser* — the sole portion of that opinion which is addressed to review of the *legislature's* choice of redistricting plans rather the District Court's — Justice White rejects this very claim in favor of continued fidelity to the strict standard of precise population equality "as nearly as practicable":

> Keeping in mind that *congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts* and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb Kirkpatrick and Wells.

412 U.S. at 793 (emphasis added).

Appellants attempt to transmute the principles of *Weiser*, as expressed most recently in *Upham v. Seamon*, ____ U.S. ____, 102 S. Ct. 1518 (1982), from limitations on a District Court's remedial power, an issue not presented here because the District Court never reached the remedial stage, into a rule which would require a District Court to balance state political policy against the constitutional mandate of population equality in assessing the constitutionality of a legislatively-enacted congressional redistricting plan in the first instance. That fight was fought and lost in *Kirkpatrick*, where the Court rejected such asserted state policy justifications as non-fragmentation of areas with distinct economic and social interests, "legislative interplay" and the exigencies of partisan politics, preservation of political subdivisions and geographical compactness. 394 U.S. at 533-536. *Accord, White v. Weiser, supra,* 412 U.S. at 791-792 and nn. 10, 12.

The language in *Weiser* and *Upham* upon which appellants rely as the basis of their "deference to legislative policy" argument, therefore, bears solely upon the District Court's prerogatives in the remedial stage of congressional redistricting litigation and has no application to its assessment of the constitutionality of a legislatively-enacted plan in the first instance:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, *whenever adherence to state policy does not detract from the requirements of the Federal Constitution*, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

White v. Weiser, supra, 412 U.S. at 795 (emphasis added) (Brief for Appellants at 11, n. 8). Moreover, even if the cited language were applicable to the present case, P.L. 1982, c. 1 does "detract from the requirements of the Federal Constitution" as set forth in *Kirkpatrick* and *Weiser* by failing to provide the greatest

practicable degree of population equality among New Jersey's congressional districts.[10]

B. The evidence before the District Court fully supported its conclusion that the Legislature violated Article I, §2 in enacting P.L. 1982, c. 1, and the state redistricting policies underlying the statute were therefore entitled to no deference until some future remedial stage of the proceeding.

The District Court relied on compelling, corroborated testimony from the legislative leadership in concluding that the Legislature did not make the required good-faith effort to achieve precise mathematical equality, but sought instead to balance the constitutional command against partisan concerns. 535 F. Supp. at 982 (J.S. 8a-9a). Senator Matthew Feldman, the sponsor of the Senate bill (S-711) which became P.L. 1982, c. 1, testified that he had been aware that other redistricting plans were available which achieved greater population equality than S-711. For Senator Feldman, however, the constitutional command was not the only standard: ". . . But you have to take it, you just can't be a single issue individual. That's very important, the zero population. You

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10. In response to arguments similar to appellants' in another 1982 congressional redistricting case, Circuit Judge Arnold aptly summarized the limitations of judicial deference to state policies in congressional redistricting:

> The *White* opinion also states that "a district court should . . . honor state policies in the context of congressional reapportionment," *Id.* at 795, but this language occurs in Part II of the opinion, and is limited to the remedial phase of the case. State policies are relevant at this stage, when a court may have to fashion a reapportionment plan of its own or choose among plans suggested by the parties. They are not relevant (except in those rare instances, up to now unrevealed, in which a state policy may be a legal justification for population variances) to the initial decision whether the State's own plan is constitutional. State policies are to be considered in the remedial phase of a case, moreover, only when "adherence to state policy does not detract from the requirements of the Federal Constitution." *White*, 412 U.S. at 795. See also *id.* at 797. We conclude that *Kirkpatrick* retains its full vigor.

Doulin v. White, 528 F. Supp. 1323, 1331 (E.D. Ark. 1982) (three-judge court). *See* Point I(C), *supra*.

also had to take in the other considerations. It's only one, as far as I was concerned, [of] three criteria." (App. 114). He added: ". . . As I said before, there were Bills that could have been lower. . . . That's not our only standard." (App. 115).

Assemblyman (now-Speaker) Alan J. Karcher viewed population equality as merely "aspirational," and considered it to be a goal which, "because of the reality of the process, normally can't be reached." (App. 118). Referring in his testimony to other redistricting criteria listed in the sworn statement he submitted to the District Court, (App. 81) Karcher maintained that such concerns as preservation of pre-existing districts, preservation of municipal boundary lines and avoidance of dilution of minority voting rights "both supplement and modify" the paramount constitutional command of population equality. (App. 118). In his view, population equality "will remain aspirational, normally, in essence, because of these factors having to also be respected." *Id.* According to the legislative leadership, therefore, population equality could be sacrificed in order to achieve non-constitutional, partisan goals.

The chronology of the Legislature's refusal to seek maximal population equality, despite the constitutional mandate, began early in 1981. When the results of the 1980 decennial census became available, it was apparent that New Jersey would lose one seat in the House of Representatives and that the Legislature would therefore be required to enact a congressional redistricting plan. In early 1981, Dr. Ernest C. Reock, Jr.[11] began to prepare a redistricting proposal which he believed would best effectuate this Court's command that absolute population equality be achieved as nearly as practicable. (App. 4).

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11. Dr. Reock is the Director of the Bureau of Government Research at Rutgers University. The principal functions of the Bureau of Government Research are to conduct research on problems of state and local government in New Jersey, to conduct training programs for local government officals in New Jersey, and to provide technical assistance to state agencies and officers and members of the public in governmental problems. In pursuit of these activities, Dr. Reock and the Bureau of Governmental Research have been involved in problems of New Jersey congressional redistricting for more than twenty years. (App. 3-4).

Dr. Reock completed his proposal (App. 8-34) on July 31, 1981 and on August 7, 1981 sent copies to then-Governor Brendant T. Byrne and to the leadership of both houses of the Legislature, among others. He sent copies to all other legislators on August 11, 1981. (App. 4-5).

Though he sent his plan to all 120 members of the Legislature, Dr. Reock received only one substantive response: a five-page letter from Assembly Speaker Christopher J. Jackman dated August 28, 1981. (App. 5). The District Court majority found the Jackman letter so "remarkable" (535 F. Supp. at 982; J.S. 5a) that it appended the letter in full to its opinion. *Id.* at 989-993 (J.S. 23a-29a). The dissenting judge, too, characterized the Jackman letter as "harshly partisan." *Id.* at 984 (J.S. 13a).

Speaker Jackman's letter, as well as his deposition testimony, demonstrates that the Legislature's primary concern was not the achievement of population equality but rather the partisan goal of achieving for the Democratic majority the kind of unfair redistricting plan which the Democrats claimed prior Republican majorities had enacted. Speaker Jackman acknowledged in his deposition that his letter's discussion of the need to prevent possible national Republican control of the House of Representatives constituted "some of the considerations" he weighed in determining how to draw a redistricting plan for New Jersey (App. 116-117). Elsewhere in his letter to Dr. Reock, Speaker Jackman was even more specific:

> Here in New Jersey the Democratic Party has control over the Congressional apportionment process for the first time ever. This occurs, as you know, because Democrats hold a majority in both houses of the legislature, as well as being represented in the Governor's seat. Ten years ago, and during every Congressional redistricting in New Jersey's history, Republicans played the predominant role. Each time Republicans sought to legislate districts which would maximize their representation in Congress. And each time Republicans drew districts which were intended to

> improve upon the previous partisan Congressional representation.
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> * * *
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> . . . Given the process by which the Legislature decides upon a plan how can you expect members of the Legislature to ignore election data which would perhaps lead to other Congressional district configurations more beneficial to party members? You in essence are asking Democrats to subjugate their interests and in effect ignore political election results in order to accommodate your 'ideal' apportionment plan.

535 F. Supp. at 990-991 (J.S. 25a-27a). Based on this evidence,[12] the District Court found that the Legislature viewed the constitutional requirement of population equality as merely one of a number of redistricting considerations to be balanced against each other, and that the Reock plan was rejected "because it did not reflect the leadership's partisan concerns." *Id.* at 982 (J.S. 8a-9a).

Moreover, despite this Court's repeated rejection of the proposition "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard," *Kirkpatrick v. Preisler*, *supra*, 394 U.S. at 530; *White v. Weiser*, 412 U.S. 783, 790 n. 8 (1973), Assemblyman Karcher aimed only for a deviation "benchmark" of "under one percent." [Karcher Deposition at 55-56, 58 (not reproduced in Joint Appendix but attached in Appendix B)]. He thereby proved the

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12. *See also* Affidavit of Assemblyman Richard Zimmer (App. 62-63) (Assembly sponsor of P.L. 1982, c.1 stated in substance during Assembly debate "that you can't have perfect equality and that therefore it is necessary to balance population equality against other criteria"; Speaker Jackman stated during Assembly debate "that when the Republicans had a majority they had drawn the redistricting maps the way they wanted them drawn, and that now the Democrats were just doing the same thing that the Republicans had done").

wisdom of Justice Brennan's observation in *Kirkpatrick* that acceptance of the *de minimis* approach "would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U.S. at 531.

Finally, the evidence before the District Court provided ample support for the Court's unanimous conclusion that the "minority dilution" rationale — appellants' sole claimed "justification" for the avoidable population deviation created by P.L. 1982, c. 1 — was only a pretext created after the fact in a vain effort to salvage the statute. Despite the fact that he continually raised a so-called "racial problem" in his testimony as a consideration involved in redistricting, for example, Speaker Jackman could not recall whether anyone defended the enacted bill during debate on that ground. [Deposition of Jackman at 87 (not reproduced in Joint Appendix but attached in Appendix B)]. There was, in fact, absolutely no contemporaneous evidence before the Court to suggest that the so-called "minority dilution" issue was ever mentioned or considered by the Legislature in enacting P.L. 1982, c. 1. Only the self-serving, post-litigation affidavits of the Democratic legislative leaders give this supposed concern dutiful, rote recitation.

There were at least four redistricting plans available to the New Jersey Legislature[13] which resulted in smaller population

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13. Appellants construct an elaborate argument on the fact that A-614 and A-615, though proposed for introduction one day before P.L. 1982, c.1 was enacted, were not given first reading in the Assembly until February 1, 1982. (Brief for Appellants at 30, n.33). They contend that the District Court erred in considering as "available to the Legislature" plans which had not been formally introduced in bill form at the time P.L. 1982, c.1 was enacted. *Id.* at 30-34.

The constitutional test is not whether less-deviant *bills* were formally *before* the Legislature, but rather whether the deviations in the enacted plan were "unavoidable" because no more equipopulous *plan* was *available* to the Legislature. It is undisputed that the Reock plan, which created a smaller population deviation than P.L. 1982, c.1, was available and had been brought to the attention of each legislator as early as August 1981. It is also undisputed that A-3547 and A-3817 were both introduced in the Legislature before S-711, the bill which became P.L. 1982, c.1, and that both A-3547 and A-3817 had smaller population deviations than the enacted bill. None of these plans, therefore, supports appellants' assertion that the District Court "blindsided [the Legislature] by alternatives that it had no chance to consider." (Brief for Appellants at 31).

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deviations than P.L. 1982, c. 1 and also, if the issue is even material, protected minority voting power in the only area of the State with a large enough minority population to constitute a congressional district majority — the Tenth (Newark) District. The District Court relied upon the following four plans in support of its conclusion "that the .6984% population deviation of P.L. 1982, c. 1 is not unavoidable" (535 F. Supp. at 982; J.S. 8a):

Bill No.	Sponsor	Date Proposed	Deviation	% Black 10th Dist.
P.L. 1982, c.1 (S-711)	Feldman	1/12/82	.6984%	54.75
A-3547	DiFrancesco	1/4/82	.1252%	52.80
A-3817	Hardwick	1/11/82	.4515%	56.70
A-614	Bennett	1/18/82	.1369%	53.21
A-615	Kavanaugh	1/18/82	.0293%	53.45

As the District Court observed, the City of Orange is 57.30% black. A-3817 places Orange in the 56.70%-black Tenth District, while P.L. 1982, c.1 places Orange in the 93%-white Eleventh District.

Appellants' discussion of the available alternative redistricting plans confirms that they consider population equality as merely

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A-614 and A-615 stand as eloquent testimony of what the Legislature could have achieved had it complied with the constitutional command to make a good-faith effort to attain population equality. If Assemblymen Bennett and Kavanaugh could formulate and propose, at the same time that the Legislature was considering P.L. 1982, c.1, redistricting plans which achieved respectively more than five times and more than 23 times greater population equality than P.L. 1982, c.1, this Court can hardly find that the deviation of the enacted statute was objectively unavoidable or the result of a good-faith legislative effort to achieve precise mathematical equality.

one criterion among many, and that they cannot contest the fact that other available plans would have achieved better population equality than the enacted law.[14] Accordingly, whatever *non-constitutional* state policies underlay P.L. 1982, c.1 were not entitled to any deference once it was determined that the resulting statute violated the paramount constitutional command of population equality.

C. The District Court showed due respect for the prerogatives of the Legislature in limiting its action to the invalidation of the legislative plan, and affording the Legislature the first opportunity to enact a constitutional replacement.

At the very end of their argument for "deference to state policy," appellants are forced to admit that the deference language of *Weiser* and *Upham* is limited to the remedial context.[15] (Brief

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14. Their only criticism of A-3547, which achieved a population deviation more than five times smaller than that of the enacted bill, is that it reduced the black percentage of the Tenth District from 54.75% to 52.80%. They contend that this difference "would have further decreased the likelihood of black control of the district." (Brief for Appellants at 29). This rationale goes the *de minimis* argument one better; instead of contending that *de minimis* population deviations are justified by substantial increases in minority strength, appellants appear to claim here that miniscule improvements in minority population percentages justify a five-fold decrease in population equality.

Appellants' search for a defect in A-3817 is even more demanding, since that bill would have created a greater concentration of black voters in the Tenth District than P.L. 1982, c.1 while reducing the enacted bill's population deviation by more than 35%. Again relying on their claimed balancing test, they are reduced to the assertion that A-3817 "diluted the minority vote in the next largest black district" (the Fourth District, which includes Trenton) from 17.3% to 11.9%. *Id.* Appellants apparently would have this Court hold that constitutionally-mandated population equality may be sacrificed in favor of meaningless increases in minority concentration which do not even approach the level required to "control" the district.

15. Like *Weiser*, and unlike this case, *Upham* reviewed a District Court order promulgating a congressional redistricting plan rather than merely invalidating a legislatively-enacted plan. What is most significant about *Upham* is that the District Court there redrew the congressional districts for Dallas County, Texas without making any finding that those districts were constitutionally or statutorily defective. 102 S. Ct. at 1520. According to its memorandum opinion summarily

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for Appellants at 14). They claim, nevertheless, that those cases should be applied *a fortiori* "to the initial question whether a legislative plan is constitutional, since this Court has repeatedly stated that Legislatures have a wider latitude in the formulation of redistricting plans than courts." *Id.* What appellants ignore, however, is the reason why judicial latitude in *formulating* redistricting plans is more limited than the scope of its *review* of legislatively-enacted plans in the first instance.

In the present case, the District Court simply invalidated P.L. 1982, c.1 on the ground that it violated the mandate of Article

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reversing the District Court's order, this Court "agree[d]" with the *Upham* appellants "that in the absence of any objection to the Dallas districts by the Attorney General, and in absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgment the plans reflect. . . ." *Id.* at 1520-1521. This Court relied specifically on *Weiser* in terms which confirm the limitation of Part II of the *Weiser* opinion to the remedial context:

> We held there that the District Court erred when, *in choosing between two possible court-ordered plans,* it failed to choose that plan which most closely approximated the state proposed plan. The only limits on judicial deference to state apportionment policy, we held, were the substantive constitutional and statutory standards to which such state plans are subject. [412 U.S.] at 797.

Id. at 1521 (emphasis added).

Upham thus imposes two limitations upon any judicial deference to state apportionment policy, each of which is sufficient to exclude the deference issue from this case:

> 1. Deference to state policy is required only in the remedial context, which the New Jersey District Court never reached; and
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> 2. Deference to state policy is not required, even in the remedial context, when the legislatively-enacted congressional redistricting statute embodying such state policy violates the federal constitutional mandate of "precise mathematical equality as nearly as practicable," as demonstrated here by the availability to the New Jersey Legislature of numerous alternative plans with lesser population deviations than P.L. 1982, c.1.

I, §2, as elucidated in *Wesberry, Kirkpatrick* and *Weiser*. 535 F. Supp. at 983 (J.S. 10a). It did not formulate its own plan, properly preferring to permit the Legislature to enact a new statute which would conform to the requirements of the Constitution. The District Court specifically granted the Legislature more than three weeks to do so before the Court would reconvene to undertake further proceedings in the absence of an intervening constitutional statute. *Id.* It therefore followed to the letter the principles of federal judicial restraint enunciated by Justice White in *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), upon which appellants rely here:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." [*Burns v. Richardson*, 384 U.S. 73] at 85 (1966).

See Brief for Appellants at 14. The District Court thus took care not to restrict, beyond what was necessary to vindicate the clear command of Article I, §2, New Jersey's freedom of choice to devise a constitutional redistricting statute.

The reason why judicial latitude is circumscribed in formulating redistricting plans is that such a judicial plan becomes "the governing law" unless the Legislature passes a superseding constitutional statute. By contrast, when a District Court merely declares a legislatively-enacted plan unconstitutional it has created no "governing law" at all. Provided that the District Court affords the Legislature a reasonable opportunity to act after it invalidates

a statute and before it undertakes the "unwelcome obligation" of judicial legislation, *Connor v. Finch*, 431 U.S. 407, 415 (1977), it has satisfactorily recognized the prerogatives of the Legislature upon which appellants rely here. The New Jersey District Court did precisely that.

Though legislatures may have "a wider latitude in the formulation of redistricting plans than courts" do in the formulation of redistricting plans (Brief for Appellants at 14), neither legislatures nor courts may formulate redistricting plans which "detract from the requirements of the Federal Constitution." *White v. Weiser, supra*, 412 U.S. at 795. A statute which violates the Constitution is entitled to no deference. The only "deference" required by *Weiser, Wise* and *Upham* is that the District Court make every effort to permit the Legislature to devise the eventual constitutional substitute for the unconstitutional statute, rather than the Court itself, and that if the Legislature fails to act the Court choose the available plan which cures the constitutional defect with the least possible violence to state policy. The New Jersey District Court fully respected that injunction by choosing no replacement plan at all, pending further legislative action.

Appellants' remaining arguments for "deference to state policy," (Brief at 14), simply make no logical sense:

> Were *White* and *Upham* to be limited to remedies, a court might be placed in the incongruous position of ordering implementation of a plan that it would have had to condemn if enacted by the legislature.

Id. This assertion is backwards. Because *Weiser* and *Upham* are limited to remedies, and give a District Court *less* remedial flexibility than a legislature, a District Court can never properly order implementation of a plan which it would have had to condemn if enacted by the Legislature. A legislative plan would require judicial condemnation only if it violated the Constitution, and no court could ever properly order implementation of a redistricting plan which violated the Constitution.

Appellants then claim that "if the constitutional standard were so strict as to leave no room for the interplay of legislative forces, then a legislature's plan could contain no state policies worth deference from the district courts." *Id.* This contention was specifically rejected in *Kirkpatrick:*

> We also reject Missouri's argument that "[t]he reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context of *legislative interplay*. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation." We agree with the District Court that "the rule is one of 'practicability' rather than political 'practicality.' " 279 F. Supp. at 989. *Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster."*

394 U.S. at 533 (emphasis added; footnote omitted). Appellants have unwittingly recognized the fundamental element of the *Wesberry-Kirkpatrick-Wells-Weiser* doctrine: there are *no* state policies which can justify the failure of a congressional redistricting plan to comply with the constitutional command that it achieve precise population equality as nearly as practicable.[16]

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16. Appellants' assertion that the District Court's application of *Kirkpatrick* to invalidate P.L. 1982, c.1 "endangers" redistricting plans adopted by other States under the 1980 census (Brief for Appellant at 22), misconceives this Court's cases. It has been clear since *Kirkpatrick* that "[t]he extent to which equality may practicably be achieved may differ from State to State . . . ." 394 U.S. at 530. That is precisely why this Court has consistently declined to establish any "fixed numerical standards" to serve as a nationwide *de minimis* rule. *Id.* Whether a statute is constitutional depends on what alternatives were available to the Legislature under "the circumstances of each particular case," *id.*, and only analysis of the facts in a particular State can resolve the constitutional issue there. Since a deviation of 0.6984% in another State might represent the greatest population equality practicable there, though it fails that test in New Jersey, the District Court's opinion "endangers" nothing but the unconstitutional P.L. 1982, c.1.

Finally, neither *Weiser* nor *Upham* "stand[s] for the proposition that adherence to legislative political choices is preferable to obtaining a minute reduction in census population deviation." (Brief for Appellants at 14). That issue was not presented by *Weiser*, since the plan chosen by the District Court there achieved *lesser* population equality than the alternative plan which this Court held should have been chosen. 412 U.S. at 796. *Upham* did not involve issues of population equality at all, but rather questions of invidious racial discrimination in a state subject to Voting Rights Act preclearance. 102 S. Ct. at 1519. Moreover, since the District Court found no statutory or constitutional violations in the Texas Legislature's redistricting of the county which the District Court nevertheless redistricted on its own, this Court ruled that the District Court had no right to impose any judicial plan in the absence of a statutory or constitutional defect in the Legislature's plan. *Id.* at 1520-1521. *Upham* therefore has nothing whatsoever to do with the question whether "adherence to legislative political choices is preferable to obtaining a minute reduction in census population of deviation." (Brief for Appellants at 14).

Stripped of its loose citation of precedent, appellants' argument may be stated simply: *Wesberry*, *Kirkpatrick*, *Wells* and *Weiser* should be limited or overruled to declare *de minimis* the New Jersey Legislature's adoption of a redistricting plan which did not achieve the greatest practicable population equality. This claim was raised and rejected in *Weiser*, 412 U.S. at 792-793, and the considerations which motivated the Court's decision there are equally or more applicable here. Each percentage point of variation here represents even more people than it did in *Weiser*, *see* n. 4, *supra* at 10, and though the total deviations are smaller than in *Weiser* each district is still "relatively enormous" and is not "so intertwined and freighted with strictly local interests as are state legislative districts." 412 U.S. at 793. The unnecessary population variances of P.L. 1982, c. 1 therefore "*do* import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation" in violation of Article I, §2. 412 U.S. at 792-793 (emphasis in original).

III.

THE DISTRICT COURT PROPERLY DECLINED, ON THIS RECORD, TO CONSIDER THE "CENSUS IMPRECISION" ISSUE.

A. The record is devoid of any evidence to establish reliably that there was an undercount in the 1980 census in New Jersey, the size of any such undercount or its distribution within the State.

Appellants assert that the 0.6984% deviation in this case "is within the statistical imprecision of the census data, and therefore is the functional equivalent of zero." (Brief for Appellants at 15). Instead of proving that proposition, the record upon which appellants rely establishes only that no one knows what the statistical imprecision of the 1980 census data is, nationally or in New Jersey, and that there is no available way to correct for or even to quantify any such disparity at any geographic level.

The dissenting judge in the District Court noted that "[i]t has been estimated" that the undercount in the 1970 census "may have been as much as 2.5% nationally and 2.6% in New Jersey," based on Census Bureau reports. 535 F. Supp. at 984 (J.S. 12a). As of March 1982, the Census Bureau had revised its estimate of the 1970 national undercount from 2.5% to 2.3%, and reported that it had "succeeded in reducing the undercount" in the 1980 census "substantially below previous levels." Bureau of the Census, *1980 Census Users' Guide* 100-101 (March 1982). The Census Bureau has nevertheless been unable to place a reliable figure on any 1980 undercount and has declined to adjust its results to attempt to compensate, principally because "the actual census count was virtually the same as the preferred estimate of the 'true' population derived from demographic analysis,[17] and no reliable estimate of the number of illegal residents was available." *Id.* at 101.[18]

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17. The actual census count was only 0.4% less than the preferred demographic estimate of "true" population. *Carey v. Klutznick*, 508 F. Supp. 420, 427 (S.D.N.Y. 1980).

18. *See* 45 Fed. Reg. 82874 (1980), *quoted in Young v. Klutznick*, 652 F. 2d 617, 621-622 (6th Cir. 1981), *cert. denied sub nom. Young v. Baldrige*, ___ U.S. ___, 102 S. Ct. 1430 (1982).

For appellants' expert James Trussell, by contrast, the lack of sufficient factual basis to support any reliable undercount estimate apparently posed little problem:

> [T]he undercount in the 1980 Census is likely to be above one percent, once an estimate of the number of illegal aliens is explicitly included in the demographic equation.

App. 103. Even Trussell admitted, however, that "[t]he undercount for New Jersey in the 1980 Census is unknown, and no reliable methodology exists for estimating it." *Id.* Nevertheless, Trussell's ability to "estimate" that for which there was no reliable evidence appeared once again unhindered by the data-free environment. Immediately after conceding that the New Jersey undercount was unknown and that there was no reliable methodology for estimating it, he estimated it anyway:

> I see no reason to believe, however, that it is below the national average.

Id. The "national average" it must be remembered, is the "likely to be above one percent" estimate which Trussell based upon the inclusion of "an estimate of the number of illegal aliens" — despite the uncontested fact that no reliable estimate of the number of illegal aliens was available.

Finally, though he apparently believed that the "national average" undercount would be spread equally over all the States, so that New Jersey's undercount would not be below that "national average," for some unstated reason Trussell nevertheless "saw no reason to believe" that New Jersey's undercount "would be uniformly spread over all municipalities." (App. 104). Accordingly, he conceded that the undercount in any congressional district is unknowable. *Id.*

The result of this series of baseless, speculative "estimates," each relying on the one before in an exponential progression of unreliability, is the conclusion upon which appellants base their entire "census imprecision" argument:

> Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero.

(Brief for Appellants at 18). But as appellants argued to this Court in reply to appellees' motion to affirm, "[t]he whole point of Dr. Trussell's testimony is that we do not, and with presently available methods can not, know the exact size of the New Jersey undercount." (Appellants' Reply Memorandum at 3, n. 1). Appellants cannot credibly claim that "the *known* imprecision of the census figures" is greater than 0.6984%, when they have repeatly conceded that the degree of imprecision in the 1980 census is in fact *unknown, unknowable* and impossible to estimate reliably.

There is therefore nothing in the record to support the assertion of the dissenting judge in the District Court, echoed by appellants here, that "[a] deviation in population between the largest and smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census." 535 F. Supp. at 985 (J.S. 14a). There is no "recognized margin of undercounting" for the 1980 census in this record or anywhere else.

B. Even if appellants' contentions concerning an alleged undercount in the 1980 New Jersey census — which are based on an asserted undercount of illegal aliens — were demonstrable from the evidence, there is no constitutional or statutory requirement that a State include illegal aliens in the population base used for intrastate congressional redistricting, and New Jersey did not purport to include them.

Appellants maintain that the alleged New Jersey undercount, regardless of their inability to establish its size, results from the failure to count illegal aliens. (J.S. 8; App. 98-104). The dissenting judge in the District Court based his reinterpretation of *Kirkpatrick* on the theory that the only population variances which must be justified are those "which do not achieve statistically significant dilutions of the relative representation of *voters* in larger districts when compared with that of *voters* in smaller districts." 535 F. Supp at 984 (J.S. 13a) (emphasis added). The question therefore arises whether the difficulty in enumerating illegal aliens has any bearing on the relative representation of voters.

Even if "the census is intended to include all residents" of the United States, "regardless of legal status," *1980 Census User's Guide*, *supra*, at 100, that is not necessarily the goal of intrastate congressional redistricting. The census has come to "fulfil[l] many important and valuable functions for the benefit of the country as a whole," but its original purpose was to provide a basis for interstate apportionment of seats in Congress. *Baldrige v. Shapiro*, ____ U.S. ____, 102 S. Ct. 1103, 1108-1109 (1982). Whether or not the Constitution requires the counting of aliens for purposes of *interstate* apportionment of seats in the House of Representatives, *see, e.g., Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.) (three-judge court), *appeal dism'd*, 447 U.S. 916 (1980), the dominant concern of this Court's jurisprudence in the *intrastate* redistricting context has been to prevent the dilution of citizens' rights to cast undiluted votes. *Wesberry v. Sanders*, *supra*, 376 U.S. at 6-18. Aliens, legal or illegal, have no constitutional right to vote. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976). Since *Wesberry* held that Article I, §2 requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," 376 U.S. at 8, the inclusion of aliens in the population base used for intrastate congressional redistricting might well violate the rights of voters in areas with relatively few alien residents. A single Congressman might then represent several times as many voters in a district with few alien residents as would his colleague from a neighboring district with many aliens. *See, e.g.*, 376 U.S. at 7. As Justice Black observed for the Court in *Wesberry*: "If the Federal Constitution intends that when *qualified voters* elect members of Congress each vote be given as much weight as any other vote, then [such a] statute cannot stand." *Id.* (emphasis added). *See* 376 U.S. at 14 ("The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.")

There is no constitutional or statutory requirement that New Jersey include aliens in the population base for purposes of intrastate congressional redistricting, and the record is barren of any suggestion that it purported to do so in enacting P.L. 1982 c. 1. Moreover, appellees agree with appellants that the New Jersey Legislature was not required to use federal census figures as the

basis for its intrastate congressional redistricting.[19] Any claimed imprecision in the population figures used by the Legislature, to the extent that it arises from the failure to count illegal aliens, is therefore immaterial to this case. There is no reason to doubt the accuracy of the 0.6984% deviation figure for P.L. 1982, c. 1 based on census imprecision, when the asserted reason for the claimed imprecision is the failure to count illegal aliens and there is no requirement that illegal aliens be counted for purposes of intrastate congressional redistricting.

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19. Brief for Appellants at 20-21; *see, e.g., Young v. Klutznick*, 652 F. 2d 617, 624-625 (6th Cir. 1981), *cert. denied sub nom. Young v. Baldrige*, ___ U.S. ___, 102 S. Ct. 1430 (1982). Although the New Jersey Constitution mandates the use of federal census figures for state legislative redistricting, it is silent with regard to congressional redistricting. N.J. Const. art. 4, §2, ¶¶1, 3.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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APPENDIX A

42 U.S.C. §1973b provides:

§1973b. Suspension of use of tests or devices in determining eligibility to vote

Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color, through the use of such tests or devices

have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon

motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state[1] which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less

than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 percentum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply to any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1,1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Appendix A

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand,or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

Completion of requisite grade level of education in American-flag schools in which predominant classroom language was other than English

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons

on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or terrority, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Congressional findings of voting discrimination against language minorities, prohibition of English-only elections; other remedial measures

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating

in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions,

assistance, or other materials or information relating to the electoral process,including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. §1973c provides:

§1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon

determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*: That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be

made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

The Appendix to 28 C.F.R. Part 51 provides:

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

* * *

APPENDIX—JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The date in parentheses is the date that was used to determine coverage for the jurisdiction it follows.

Alabama (statewide) (Nov. 1, 1964)
Alaska (statewide) (Nov. 1, 1972)
Arizona (statewide) (Nov. 1, 1972)

(The following Arizona counties were covered individually through the use of earlier dates.)

Apache County (Nov. 1, 1968)
Cochise County (Nov. 1, 1968)

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Coconino County (Nov. 1, 1968)
Mohave County (Nov. 1, 1968)
Navajo County (Nov. 1, 1968)
Pima County (Nov. 1, 1968)
Pinal County (Nov. 1, 1968)
Santa Cruz County (Nov. 1, 1968)
Yuma County (Nov. 1, 1964)

California (the following counties only)
Kings County (Nov. 1, 1972)
Merced County (Nov. 1, 1972)
Monterey County (Nov. 1, 1968)
Yuba County (Nov. 1, 1968)

Colorado (the following county only)
El Paso (Nov. 1, 1972)

Connecticut (the following towns only)
Groton Town (Nov. 1, 1968)
Mansfield Town (Nov. 1, 1968)
Southbury Town (Nov. 1, 1968)

Florida (the following counties only)
Collier County (Nov. 1, 1972)
Hardee County (Nov. 1, 1972)
Hendry County (Nov. 1, 1972)
Hillsborough County (Nov. 1, 1972)
Monroe County (Nov. 1, 1972)

Georgia (statewide) (Nov. 1, 1964)

Hawaii (the following county only)
Honolulu County (Nov. 1, 1964)

Idaho (the following county only)
Elmore County (Nov. 1, 1968)

Louisiana (statewide) (Nov. 1, 1964)

Massachusetts (the following towns only)
Amherst Town (Nov. 1, 1968)
Ayer Town (Nov. 1, 1968)
Belchertown (Nov. 1, 1968)
Bourne Town (Nov. 1, 1968)
Harvard Town (Nov. 1, 1968)
Sandwich Town (Nov. 1, 1968)
Shirley Town (Nov. 1, 1968)
Sunderland Town (Nov. 1, 1968)

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Wrentham Town (Nov. 1, 1968)
Michigan (the following townships only)
Buena Vista Township (Saginaw County) (Nov. 1, 1972)
Clyde Township (Allegan County) (Nov. 1, 1972)
Mississippi (statewide) (Nov. 1, 1964)
New Hampshire (the following political subdivisions only)
Antrim Town (Nov. 1, 1968)
Benton Town (Nov. 1, 1968)
Boscawen Town (Nov. 1, 1968)
Millsfield Township (Nov. 1, 1968)
Newington Town (Nov. 1, 1968)
Pinkhams Grant (Nov. 1, 1968)
Rindge Town (Nov. 1, 1968)
Stewartstown (Nov. 1, 1968)
Stratford Town (Nov. 1, 1968)
Unity Town (Nov. 1, 1968)
New York (the following counties only)
Bronx County (Nov. 1, 1968)
Kings County (Nov. 1, 1968)
New York County (Nov. 1, 1968)
North Carolina (the following counties only)
Anson County (Nov. 1, 1964)
Beaufort County (Nov. 1, 1964)
Bertie County (Nov. 1, 1964)
Bladen County (Nov. 1, 1964)
Camden County (Nov. 1, 1964)
Caswell County (Nov. 1, 1964)
Chowan County (Nov. 1, 1964)
Cleveland County (Nov. 1, 1964)
Craven County (Nov. 1, 1964)
Cumberland County (Nov. 1, 1964)
Edgecombe County (Nov. 1, 1964)
Franklin County (Nov. 1, 1964)
Gaston County (Nov. 1, 1964)
Gates County (Nov. 1, 1964)
Granville County (Nov. 1, 1964)

Appendix A

Greene County (Nov. 1, 1964)
Guilford County (Nov. 1, 1964)
Halifax County (Nov. 1, 1964)
Harnett County (Nov. 1, 1964)
Hertford County (Nov. 1, 1964)
Hoke County (Nov. 1, 1964)
Jackson County (Nov. 1, 1972)
Lee County (Nov. 1, 1964)
Lenoir County (Nov. 1, 1964)
Martin County (Nov. 1, 1964)
Nash County (Nov. 1, 1964)
Northampton County (Nov. 1, 1964)
Onslow County (Nov. 1, 1964)
Pasquotank County (Nov. 1, 1964)
Perquimans County (Nov. 1, 1964)
Person County (Nov. 1, 1964)
Pitt County (Nov. 1, 1964)
Robeson County (Nov. 1, 1964)
Rockingham County (Nov. 1, 1964)
Scotland County (Nov. 1, 1964)
Union County (Nov. 1, 1964)
Vance County (Nov. 1, 1964)
Washington County (Nov. 1, 1964)
Wayne County (Nov. 1, 1964)
Wilson County (Nov. 1, 1964)

South Carolina (statewide) (Nov. 1, 1964)
South Dakota (the following counties only)
Shannon County (Nov. 1, 1972)
Todd County (Nov. 1, 1972)
Texas (statewide) (Nov. 1, 1972)
Virginia (statewide) (Nov. 1, 1964)
Wyoming (the following county only)
Campbell County (Nov. 1, 1968)

[46 FR 872. Jan. 5, 1981; Order No. 921a-80, 46 FR 9571, Jan. 29, 1981]

APPENDIX B — EXCERPTS FROM DEPOSITIONS

Deposition of Christopher J. Jackman

* * *

DIRECT EXAMINATION BY MR. GOLDSTEIN:

* * *

[86] Q. Well, while you were present, do you recall if anyone ever defended the plan as to population deviations? A. I don't recollect.

[87] Q. Or if anyone ever defended the plan as to the racial problem that you raised with us earlier in the deposition today? A. I don't recall.

* * *

Deposition of Alan J. Karcher

* * *

DIRECT EXAMINATION BY MR. GOLDSTEIN:

* * *

[55] Q. But in July or August of 1981 you were, at least, aware of Dr. Reock's plan that provided for an absolute deviation of 1710 people and an absolute relative deviation of .325 percent?

MR. WALSH: An absolute percentage deviation I think is the word.

MR. GOLDSTEIN: I'll accept that.

A. I was aware of that, yes.

Q. You were aware of that as— A. I was aware that Dr. Reock had sent this plan in.

Q. And you were aware of its deviation? A. I was aware that it had a deviation — I won't say I had an awareness that it was .325. I had an awareness that it met some benchmark of being under one percent.

[56] Q. One percent as a benchmark? A. In my mind generally, yes. I — anything that was over one percent I would dismiss out of hand.

Q. And under one percent? A. Under one percent I think you were in the ballpark. At least it was worth discussing.

What I am saying is you have to draw certain dichotomies or lines in your mind as to what you're going to, as I said before, whether you're going to tilt with windmills or waste your time wasting energy.

If you're going to be shown a map that had an overall deviation, mean deviation of one percent, it wasn't worth looking at, in my mind. Wasn't worth discussing. Let's cut it off there. It's tilting, you know, an exercise in futility, tilting at windmills.

* * *

[58] Q. Now, when you use one percent as a benchmark, how did you come to one percent?

MR. WALSH: Objection, form. He didn't say he used it as a benchmark. He described it in his answer. I object to the form. Improper question, mischaracterizes the testimony.

Appendix B

Q. Mr. Karcher, what is your testimony as to — A. My testimony is anything over one percent, it's a benchmark only in terms of the fact that I, as a leader, or as a — playing a certain function within the party, would not allow my delegation to waste its time looking at any map or I wouldn't allow a member who came to me to try to proselytize his plan, to come in with something over one percent.

I would say to him, look, don't bother to even introduce this. Don't bother to pursue it if you don't have something lower than one percent. You're spinning your wheels, you're spinning your wheels, don't spin mine.

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